Lawrenceville Ready-Mix Co. *and* Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 144, affiliated with the International Brotherhood of Teamsters, AFL–CIO.[1] Case 14–CA–21302

December 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On July 24, 1991, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions, a supporting brief, and a motion to dismiss. The General Counsel filed an answering brief in opposition to the Respondent's motion to dismiss.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

The Respondent excepted to the judge's findings that it violated Section 8(a)(5) and (1) by unilaterally changing its unit employees' health and welfare insurance carrier and ceasing to make required contributions on behalf of its employees to the Indiana Conference of Teamsters Construction and Material Division Health and Welfare Plan (Indiana Teamsters Plan). The Respondent contends that it had a right to change plans because it informed the Union it could not afford the Indiana Teamsters Plan and that the parties had reached impasse in bargaining about the matter. The Respondent's arguments are the same as those rejected by the judge and, for the reasons stated by the judge, we also reject them. Thus, we find the Respondent's exceptions lacking in merit.

The Respondent also filed a motion to dismiss, asserting that the judge's remedy and recommended Order are no longer appropriate because the parties have entered into a new collective-bargaining agreement effective from January 1, 1991, through December 1993 that specifies a different health and welfare plan/carrier. Thus, the Respondent contends that it has fulfilled its bargaining obligation and the matter is now moot. The Respondent also contends that it should not be required to make any payments to the Indiana Teamsters Plan because there was no lapse in health insurance coverage for its employees and, thus, the Board's ordering it to make payments to the Indiana Teamsters Plan will result in the onerous imposition on it of a triple financial obligation.

For the following reasons, we disagree that the case should be dismissed as moot, but we will allow the Respondent to raise, in compliance, the question of the effect of the alleged new bargaining agreement on its obligations under the make-whole portions of the recommended Order.

By urging dismissal of the case on mootness grounds, the Respondent is essentially arguing that it should not be found to have committed any violation at the time it unilaterally ceased making payments under the established Indiana Teamsters Plan and substituted another carrier of its own choosing. Even assuming arguendo that the Respondent later negotiated an agreement concerning health coverage that was made retroactive to the date on which the unilateral action occurred, we find the fact remains that the Respondent committed a violation when it took unilateral action undermining the collective-bargaining relationship and a cease-and-desist order, at the very least, is appropriate.[3]

With respect to the Respondent's contention that the recommended Order improperly penalizes it by effectively requiring triple payments for the same period, we note that the evidence proffered by the Respondent consists of a copy of a collective-bargaining agreement that is unsigned and undated. We cannot rely on this evidence to find that the Respondent is bound or that benefits have been paid out. Nevertheless, although we deny the Respondent's motion to dismiss, we shall permit the parties to introduce evidence at the compliance stage relevant to what, if anything, remains to be done to make the employees and the Indiana Teamsters Plan whole for the Respondent's unilateral substitution of a different health plan for the Indiana Teamsters Plan.

Several issues may be determined in compliance. First, the Respondent may seek to prove that the collective-bargaining agreement it has proffered is an executed agreement that became retroactively effective as of a date on or before the date on which the Respondent ceased making contributions into the Indiana Teamsters Plan. If the Respondent fails to establish this, then the Respondent must comply with all the provisions of the Order recommended by the administrative law judge. If, however, the Respondent submits sufficient proof of its contention—thereby establishing that it agreed with the Union to establish a health plan different from the Indiana Teamsters Plan and make that new plan effective on or before the date on which the Respondent had discontinued payments into Indi-

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] In sec. 2(b) of his recommended Order, the judge inadvertently stated that the Respondent's last payment to the Union's Indiana Conference of Teamsters Construction and Materials Division Health and Welfare Plan was made in January 1990; the correct date is 1991.

[3] See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 399 fn. 4 (1952). See also *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950).

ana Teamsters Plan—then the Respondent will be liable only for any benefits paid out by the Indiana Teamsters Plan on behalf of the unit employees during the period before the parties executed the new agreement and any unreimbursed medical expenses incurred by the employees during that period which would have been covered by the Indiana Teamsters Plan.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lawrenceville Ready-Mix Co., Lawrenceville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subrequent paragraphs accordingly.

''(b) Make its employees and the Union's Indiana Conference of Teamsters Construction and Materials Division Health and Welfare Plan whole by paying to the plan, with interest, the amounts as provided in the 1988–1990 collective-bargaining agreement, as amended in 1989, which expired on December 31, 1990. The obligations shall commence following the last payment that was made in January 1991, for the period corresponding to the payment, and continue until such time as the Respondent negotiates in good faith to a new agreement or to an impasse. If, during the compliance stage of this matter, any one of the parties introduces evidence showing that the Respondent's bargaining obligation has been met and there is a collective-bargaining agreement in existence that covers the entire period in dispute, then the Respondent shall make whole the Union's Indiana Conference of Teamsters Construction and Materials Division Health and Welfare Plan only to the extent that it paid medical claims submitted by the Respondent's employees during the period of the Respondent's unlawful discontinuance. The Respondent shall also make its employees whole, with interest, for any loss they suffered due to the Respondent's unlawful discontinuance of its payments to the Union's Indiana Conference of Teamsters Construction and Materials Division Health and Welfare Plan.''

2. Substitute the attached notice for that of the administrative law judge.

[4] We note that the Indiana Teamsters Plan is solely a health insurance plan, and not a pension plan, so we are not dealing with the problem of protecting the stability of a fund in whose future viability the employees have a clear economic stake. Cf. *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 201 and cases there cited (1990), enf. denied and remanded 942 F.2d 151 (2d Cir. 1991).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 144, affiliated with the International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of our employees in the appropriate unit described as follows:

> All drivers and operators of ready-mix concrete trucks; excluding sales and technical employees, office clerical employees and guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally cease payments to the Indiana Conference of Teamsters Construction and Materials Division Health and Welfare Plan, as required by our 1988–1990 collective-bargaining agreement with the Union, as amended by our agreement with the Union dated December 5, 1989.

WE WILL NOT unilaterally institute any medical insurance plan with respect to employees in the above-described appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL make our employees and the Union's Indiana Conference of Teamsters Construction and Materials Division Health and Welfare Plan whole by paying to the plan, with interest, the amounts provided in the 1988–1990 collective-bargaining agreement, as amended in 1989, which expired on December 31, 1990. The obligations shall commence following the last payment that was made in January 1990, for the period corresponding to that payment, and continue

until such time as we negotiate in good faith to a new agreement or to an impasse or if a collective-bargaining agreement has been agreed to that covers the period of our unlawful discontinuance of the Indiana Plan, we shall make whole the plan by reimbursing it for any medical claims it paid for our employees. We shall also make our employees whole, with interest, for any losses they suffered due to our unlawful discontinuance of payments to the Union's Indiana Conference of Teamsters Construction and Materials Division Health and Welfare Plan.

LAWRENCEVILLE READY-MIX CO.

Franchette C. Potter, Esq., for the General Counsel.
Joseph A. Yocum, Esq. (Yocum & Yocum), of Evansville, Indiana, for the Respondent.
Michael Gratzek, of Vincennes, Indiana, for the Charging Party.

DECISION

DAVID L. EVANS, Administrative Law Judge. This matter was tried before me in St. Louis, Missouri, on May 30, 1991. The March 18, 1991 charge was filed against Lawrenceville Ready-Mix Co. (the Respondent) by Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 144, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union), and the complaint on the charge issued on May 1, 1991. The allegation is that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by its unilateral changing of the health and welfare program that covered its employees who are represented by the Union and by its unilateral discontinuance of payments to a health and welfare program that had been established by an expired collective-bargaining agreement. Respondent filed an answer admitting jurisdiction, but denying the commission of any unfair labor practices.

After consideration of the testimony at the hearing and the briefs filed by the General Counsel and Respondent, I make the following[1]

FINDINGS OF FACT

Respondent is an Illinois corporation with an office and place of business in Lawrenceville, Illinois, where it is engaged in the manufacture and delivery of ready-mix concrete and related products. During the year ending March 31, 1991, Respondent, in the course and conduct of that business, sold and shipped products, goods, and materials valued in excess of $50,000 to other enterprises located in Illinois, each of which other enterprises meets a direct standard of assertion of the Board's jurisdictional standards. Therefore, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The General Counsel's unopposed motion to correct the record is granted.

I. THE UNFAIR LABOR PRACTICES

Respondent employs four drivers of ready-mix concrete trucks; the Union has represented the drivers since at least 1973. Respondent and the Union have been parties to a succession of collective-bargaining agreements, the last of which was effective from January 1, 1988, through December 31, 1990.[2] As originally entered, that agreement provided health and welfare coverage for the unit employees under the Central States Southeast and Southwest Areas Health and Welfare Fund, and Respondent was required to make contributions to that fund on the employees' behalf. By agreement dated December 5, 1989, the parties substituted the Indiana Conference of Teamsters Construction and Materials Division Health and Welfare Plan (the Indiana Teamsters Plan) for unit employee health and welfare coverage.

The parties met once, on October 24, 1990, for purposes of negotiating a successor agreement. Respondent's agents expressed to the Union that Respondent was having difficulty making the required payments to the Indiana Teamsters Plan. The parties compared the Indiana Teamsters Plan to the Central States Plan; neither proposed going back to the Central States Plan. At one point Respondent proposed that any increases in premiums in the Indiana Teamsters Plan be deducted from employee wages, but no agreement was reached. Other matters, such as seniority and overtime premiums, were discussed, but no agreements were reached. At no point in the meeting did Respondent's agents propose doing away with the Indiana Teamsters Plan and substituting another plan.

After the collective-bargaining agreement expired on December 31, 1990, Respondent made one more of its required payments to the Indiana Teamsters Plan, on January 17, 1991. On March 8, 1991, by letter, Respondent first notified the Union that it had contracted for employee coverage with ''other health insurance.'' Respondent had contracted with the Associated General Contractors of America for participation in that organization's group health insurance plan.

II. CONCLUDING FINDINGS

As the Board stated in *Bay Area Sealers*, 251 NLRB 89 at 90 (1980):

> Although an employer's contractual obligations cease with the expiration of the contract, those terms and conditions established by the contract and governing the employer-employee, as opposed to the employer-union, relationship survive the contract and present the employer with a continuing obligation to apply those terms and conditions unless the employer gives timely notice of its intention to modify a condition of employment and the union fails to timely request bargaining, or impasse is reached during bargaining *over the proposed change*. [Emphasis added.]

Here, Respondent gave no notice, timely or otherwise, that it was contemplating changing the established plan of unit employee insurance coverage. Of course, there was no im-

[2] The complaint alleges, and the answer admits, that the last contract between the parties contains a description of the appropriate unit. There is no unit description, as such, in the contract; the unit description herein is based on undisputed facts.

passe, as the matter of substituting another carrier was never discussed.

Respondent appears to argue that the contractual provisions for employee coverage under the Indiana Teamsters Plan terminated by operation of the collective-bargaining agreement that established Respondent's obligations under that plan. The language on which Respondent relies is:

> The obligation to make contributions to the Fund shall be terminated when and if such contributions are no longer required by a collective bargaining agreement between the parties.

Respondent argues that, because the contract between the parties had expired, contributions to the Indiana Teamsters Plan were no longer required.

This is a fallacious construction of the quoted language. The language is a simple statement that the obligations continue until entry into a contract that eliminates the obligation.

Moreover, after the contract expired on December 31, 1990, the contributions were required not only by the contract; they were required by operation of law, as stated above.

Accordingly, I find and conclude that by changing the unit employees' health and welfare insurance carriers, and ceasing to make contributions on behalf of its employees to the Indiana Conference of Teamsters Construction and Material Division Health and Welfare Plan, as required by Respondent's 1988–1990 collective-bargaining agreement with the Union, as amended by its agreement with the Union dated December 5, 1989, each of which action was taken without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees with respect to such acts and conduct and the effects of such acts and conduct, Respondent has violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent make its employees whole by paying, with interest,[3] all contributions to the Union's Indiana Conference of Teamsters Construction and Material Division Health and Welfare Plan, as provided in the expired collective-bargaining agreement between Respondent and the Union, which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments; however, nothing in this order shall be construed as requiring Respondent to rescind the medical insurance plan benefits which it unilaterally established in violation of the Act.[4]

Additionally, I shall recommend that Respondent be ordered to make whole the unit employees for the losses or expenses they suffered due to Respondent's unilateral cessation of payments, with interest.[5]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Lawrenceville Ready-Mix Co., Lawrenceville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 144, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive representative of its employees in the appropriate unit described as follows:

> All drivers and operators of ready-mix concrete trucks; excluding sales and technical employees, office clerical employees and guards, and supervisors as defined in the Act.

(b) Unilaterally ceasing payments to the Indiana Conference of Teamsters Construction and Material Division Health and Welfare Plan, as required by Respondent's 1988–1990 collective-bargaining agreement with the Union, as amended by its agreement with the Union dated December 5, 1989.

(c) Unilaterally instituting any medical insurance plan with respect to employees in the above-described appropriate unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Make its employees and the Union's Indiana Conference of Teamsters Construction and Material Division Health and Welfare Plan whole by paying to the plan, with interest, the amounts as provided in the 1988–1990 collective-bargaining agreement, as amended in 1989, which expired on December 31, 1990. The obligations shall commence following the last payment that was made in January 1990, for the period corresponding to the payment, and continue until such time as Respondent negotiates in good faith to a new agreement or to an impasse. Respondent shall also make its employees whole, with interest, for any loss they suffered due to Respondent's unlawful discontinuance of its payments to the Union's Indiana Conference of Teamsters Construction and Material Division Health and Welfare Plan.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

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[3] See *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[4] See *Stone Boat Yard*, 264 NLRB 981, 983 at fn. 7 (1982).

[5] See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at its Lawrenceville, Illinois place copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''